



POLICE DEPARTMENT

January 24, 2010

MEMORANDUM FOR: Police Commissioner

RE: Sergeant Fernando Valerio
Tax Registry Number 914032
Police Service Area 7
Disciplinary Case No. 86053/10

Police Officer Albert Torres
Tax Registry Number 924562
Police Service Area 7
Disciplinary Case No. 86054/10

The above-named members of the Department appeared before me on
September 8, 2010, and October 12, 2010, charged with the following:

Disciplinary Case No. 86053/10

1. Sergeant Fernando Valerio, while assigned to PSA-7, while on-duty, on or about July 21, 2008,¹ in the vicinity of St. Mary's Park in Bronx County, did engage in conduct prejudicial to the good order, efficiency and discipline of the Department in that said Sergeant did abuse his authority as a member of the New York City Police Department by supervising the stop of Ms. Esmirna² Delorbe and Mr. Luis Flores without sufficient legal authority. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – ABUSE OF AUTHORITY

2. Sergeant Fernando Valerio, while assigned to PSA-7, while on-duty, on or about July 21, 2008, in the vicinity of St. Mary's Park in Bronx County, did engage in conduct prejudicial to the good order, efficiency and discipline of the Department, in that said Sergeant did abuse his authority as a member of the New York City Police Department by supervising a search of Ms. Esmirna Delorbe and Mr. Luis Flores without sufficient legal authority. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – ABUSE OF AUTHORITY

¹ The charges inaccurately cite the date of July 28, 2008.

² The charges contain an inaccurate spelling of Delorbe's first name.

3 Sergeant Fernando Valerio, while assigned to PSA-7, while on-duty, on or about July 21, 2008, in the vicinity of St Mary's Park in Bronx County, did fail to maintain his activity log in that after an encounter with Ms Esmirna Delorbe and Mr Luis Flores said Sergeant failed to make notations about the encounter in his activity log *(As amended)*

P G 212-08, Page 1 – ACTIVITY LOGS

4 Sergeant Fernando Valerio, while assigned to PSA-7, while on-duty, on or about July 21, 2008, in the vicinity of St Mary's Park in Bronx County, after having a street encounter with Ms Esmirna Delorbe and Mr Luis Flores said Sergeant did fail to prepare a UF-250 Stop and Frisk Report *(As amended)*

P G 212-11, Page 1 – STOP AND FRISK

5 Sergeant Fernando Valerio, while assigned to PSA-7, while on-duty, on or about July 21, 2008, in the vicinity of St Mary's Park in Bronx County, did wrongfully and without just cause fail to supervise another member of the service under his supervision, to wit after engaging in a street encounter with Ms Esmirna Delorbe and Mr Luis Flores said Sergeant failed to ensure that Police Officer Albert Torres made entries in his activity log and prepared a UF-250 Stop and Frisk Report *(As amended)*

P G 203-10, Page 1, Paragraph 5 – ABUSE OF AUTHORITY

Disciplinary Case No 86054/10

1 Police Officer Albert Torres, while assigned to PSA-7, while on-duty, on or about July 21, 2008, in the vicinity of St Mary's Park in Bronx County, did engage in conduct prejudicial to the good order, efficiency and discipline of the Department in that said police officer did abuse his authority as a member of the New York City Police Department by threatening to issue summonses to Ms Esmirna Delorbe and Mr Luis Flores without sufficient legal authority *(As amended)*

P G 203-10, Page 1, Paragraph 5 – ABUSE OF AUTHORITY

2 Police Officer Albert Torres, while assigned to PSA-7, while on-duty, on or about July 21, 2008, in the vicinity of St Mary's Park in Bronx County, did engage in conduct prejudicial to the good order, efficiency and discipline of the Department, in that said police officer did abuse his authority as a member of the New York City Police Department by failing to provide his name or shield number to Ms Esmirna Delorbe and Mr Luis Flores upon request *(As amended)*

P G 203-09, Page 1, Paragraph 1 – PUBLIC CONTACT

3 Police Officer Albert Torres, while assigned to PSA-7, while on-duty, on or about July 21, 2008, in the vicinity of St Mary's Park in Bronx County, did fail to maintain his activity log in that after an encounter with Ms Esmirna Delorbe and Mr Luis Flores said police officer failed to make notations about the encounter in his activity log. *(As amended)*

P G 212-08, Page 1 – ACTIVITY LOGS

4 Police Officer Albert Torres, while assigned to PSA-7, while on-duty, on or about July 21, 2008, in the vicinity of St Mary's Park in Bronx County, after having a street encounter with Ms Esmirna Delorbe and Mr Luis Flores said police officer did fail to prepare a UF-250 Stop and Frisk Report *(As amended)*

P G 212-11, Page 1 – STOP AND FRISK

The Department was represented by Adam Sheldon, Esq , Department Advocate's Office, and Roger Smith from the Civilian Complaint Review Board
Respondent Valerio was represented by John D'Alessandro, Esq , and Respondent Torres was represented by Craig Hayes, Esq

The Respondents, through their counsel, entered pleas of Not Guilty to the subject charges A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review

DECISION

The Respondents are found Guilty as charged

SUMMARY OF EVIDENCE PRESENTED

Introduction

It is not disputed that on July 21, 2008, the Respondents, assigned to Police Service Area 7 (PSA 7), performed a tour of duty which started at 0930 hours and ended

at 1900 hours They were assigned to anti-crime duties regarding housing developments located within the confines of the 40 and 42 Precincts Respondent Valerio was the anti-crime team's supervisor Respondent Torres was the driver of their unmarked Department vehicle, Radio Motor Patrol (RMP) number 9691 Police Officer Dlorah Duluc was the third member of the team All three of them were dressed in plainclothes

The Department's Case

The Department called Esmirna Delorbe and Luis Flores as witnesses

Esmirna Delorbe

Delorbe, a United States citizen who was born in the Dominican Republic, testified that she has lived in New York City since 1992 She is presently a graduate student at Lehman College pursuing a Master's degree in business She has a Bachelor's degree in Criminal Justice and served in the United States Navy for eight years, five years on active duty and three years on reserve duty She was previously employed as a taxi driver, she has never been convicted of a crime, and, prior to July 21, 2008, she had never filed a complaint against a police officer She has not filed a civil lawsuit against the City of New York or anyone regarding an encounter she had with police officers on July 21, 2008

At about 12 30 p m on July 21, 2008, she was in St Mary's Park with her friend Luis Flores, who she had met through her sister-in-law She and Flores went to St Mary's Park that day to sit and "to have fun with the kids " She was wearing shorts and a

tank top Flores had driven her to the park that day in his [REDACTED]

[REDACTED] Delorbe was located at the corner of 149 Street and St Ann's Avenue

Delorbe was shown a map depicting St Mary's Park [Department's Exhibit (DX) 1] She and Flores were sitting on a rock Delorbe identified the rock in photographs (DX 2) She and Flores were facing the playground area

A short, Hispanic-looking man came up from behind them He said "Policia" in Spanish and told them, "Raise your hands " They raised their hands The man then asked them, in both English and Spanish, "What are you doing?" She and Flores told him, "We are sitting down We are in the park " Because the man was wearing shorts, a tee shirt, and sunglasses, and appeared to be alone, Delorbe did not initially believe that he was really a police officer and, although she and Flores had raised their hands in the air, she "thought it was a joke " Then she saw two other people approaching One was a tall male, who also looked Hispanic, and the other person was a Caucasian-looking female It was at that point that she and Flores realized that "this is for real" and they both stood up "to cooperate so they can do their job "

All three police officers were dressed in plainclothes and one displayed a shield, although Delorbe could not recall which officer did this Delorbe recalled that the short male officer who had initially approached them alone had "stuff" on his face that looked "like a birthmark" or "like dots " Delorbe identified Respondent Torres in the Trial Room as this officer Delorbe identified Respondent Valerio in the Trial Room as the tall male officer Delorbe recalled that Respondent Torres "was the one doing all the talking " The female officer searched Delorbe by patting down her body on the outside

of her clothing Delorbe handed the female officer her military ID card The female officer looked at her military ID card and then returned it to her

Delorbe watched as Respondent Torres searched Flores When Respondent Torres found car keys in Flores' pocket, he asked Flores, "What are you doing with these keys?" Flores told Respondent Torres that the car keys were his and that he owned a

Respondent Torres then said, "Oh, just that I have the same type of car keys" for a " " Respondent Torres asked Flores, "Where are you parked at?" Flores responded, "Right there," and indicated to Respondent Torres where he had parked his

Respondent Torres stated that they were doing "random checks" and that they "do this because a lot of people like to go to that park and do drugs" and that "a lot of teenagers like to go and do drugs there." Delorbe asked him, "Do we look like criminals?" Respondent Torres then asked her, "Well, what's a criminal face?" Delorbe then told Respondent Torres, "Well, you are the police You tell me "

Delorbe told Respondent Torres that she felt offended and that she felt that they had violated her civil rights Delorbe explained that she had felt offended because although there were other people in the park the officers "came straight to us" even though she and Flores "wasn't doing nothing They can see it " Respondent Torres then came up face-to-face with her, leaned forward and said, "Oh, really, really," and told her to "give me your ID back again " He took her military ID As he started to walk away, she asked him for his name He ignored her and the other two officers said nothing Respondent Torres kept walking, but he returned "a minute later," handed her ID back to

her and told her that he did not want to see her again in the park. He told her that if he saw her again, he would give her a summons

Delorbe recalled that at that point she felt even more offended, so she asked Flores to give her his notebook. Flores, who is a taxicab driver, took out a notebook and a pen. Delorbe told Flores, "Give it to me because I am going to get some information." She then asked Respondent Torres, "What's your name?" He told her, in Spanish, "Officiale." She then said, "No, no. Officer what? Give me your name." There was a one minute pause, during which Respondent Torres looked over at Respondent Valerio and the female officer. Respondent Torres then said, "Officer Mercado." Delorbe wrote this down on a piece of paper and then asked Respondent Torres, "What precinct you from?" He answered, "Precinct 40." She wrote this down also.

Delorbe and Flores then left the park. As they were walking away, she could hear Respondent Valerio telling Respondent Torres something, but Delorbe could not make out what he was saying. Delorbe and Flores went directly to the 40 Precinct to file a complaint. Delorbe was concerned that if she went back to the park again and Respondent Torres saw her he would issue her a ticket for no reason.

At the 40 Precinct, a female Police Officer, named Rodriguez, told Delorbe that the only Police Officer Mercado assigned to the 40 Precinct worked night tours and that there was no officer named Mercado on the day tours. Delorbe filed a complaint at the 40 Precinct.

During the fall of 2008, Delorbe saw the Respondents again, this time in front of her residence. Delorbe recalled that she had just had her hair done in the hair salon on the first floor of her building. As she was coming out of the salon, she saw the two

Respondents driving by her inside a Chevrolet Impala. They parked beside her car. As she was getting into her car, they started to speak to her. She had the impression that they did not recognize her. She asked them, "Do I know you?" When Respondent Valerio said, "I don't think so," she said, "Let me see," and she walked up close to their car and looked inside. When she saw Respondent Valerio's "tall legs," she told them, "Yes, I know you. You remember me?" When they kept telling her, "No," she told them, "Yes, I am the girl from the park. Remember that day?" The Respondents then laughed and asked her, "Are you still mad at us? You know, we were kidding." She responded, "What do you think?" The Respondents then drove away.

Delorbe asserted that she is one hundred percent certain that the Respondents are the two male officers who approached her and Flores inside St. Mary's Park on July 21, 2008.

On cross-examination by Respondent Torres' counsel, Delorbe recalled that on July 21, 2008, Respondent Torres was wearing "shorts, shorts jeans" and a T-shirt. His shorts were "up to the knees." Delorbe was confronted with a statement she made at her interview at the Civilian Complaint Review Board (CCRB) that Respondent Torres "didn't look like the police because he got like blue jeans and a navy blue shirt." Delorbe reiterated that Respondent Torres was wearing "short blue jeans" and she explained that her CCRB interviewer had told her to "give me an average, give me a range, so that's the way I was answering," and that she recalled telling her CCRB interviewer that he wore "shorts to the knees" or that his pants were to the knees. Delorbe testified that on July 21, 2008, neither of the Respondents was wearing a hat, but both of them were wearing sunglasses. Delorbe recalled that she went back to CCRB on

February 2, 2009, to look at photographs Delorbe was confronted with a statement she made at CCRB that day When she was asked, "So you are saying the first time you didn't see his hair at all, he had a hat on?" She had answered, "Yeah I mean, I couldn't tell how short it was He got a hat on, but this time he didn't have no glasses this time, so I could tell, you know, his face " When asked to explain, Delorbe answered that she did not remember saying that and she explained "that the second time that I saw him it was more clear because the first time he got glasses and the second time he didn't have no glasses " His hat was kind of like a baseball cap and he wore normal sunglasses, not eye glasses

She was asked if at an interview with CCRB on July 28, 2008, her first in-person interview, she was asked, "Could you, could you see his face or " and that she answered, "No, no, you could not see face but " She could not recall being asked that question and giving that answer When she was asked, "Did you see Officer Torres' face clearly in the park that day?" She answered, "Yes," with glasses and a hat and "dots" on his face A CCRB investigator called her on January 26, 2009 She described the second incident where the Respondents pulled their car up by the beauty salon and she said that she could see Respondent Torres' face clearly this time She did not mean to imply that on July 21, 2008, she could not see his face clearly She explained that she meant that "the first time I saw him with glasses, and the second time I saw him without glasses " She never saw his hair or his eyes on July 21, 2008 She is certain it was the same person on both occasions The sergeant did not have a hat on the first time At CCRB, in February, 2009, she was shown photographs one photo at a time She has good vision but "they looked younger in the pictures, so it was hard to tell "

On cross-examination by Respondent Valerio's attorney, Delorbe confirmed that on July 21, 2008, she was in the park with her children enjoying a sunny day. Her children were then ages 12, 9 and 3. She was facing the playground sitting up on the rocks while her three-year-old was in the playground. When she was asked if she had told the CCRB investigator on the phone on the day of the incident that her children were not with her, she responded, "I don't remember that."

Delorbe was confronted with a statement she made to CCRB that, "And at that point, they threaten me not to go to the park. My park [REDACTED]." And I take my kids to the park all the time. This day, I wasn't with them. I was with my friend." Delorbe asserted that her children accompanied her to the park that day in Flores' taxi even though it has no child car seat. On July 21, 2008, Respondent Valerio was wearing jeans and a shirt. He was not wearing a hat and his hair looked "a little bit higher." He had a mustache but not a beard. At their second encounter, essentially he looked the same. On February 2, 2009, at CCRB, she stated that he had a very short haircut, almost shaved off. She explained that she was talking about Respondent Torres. She agreed that she never identified Respondent Valerio's photo when she was shown photographs. She explained that she saw their faces more clearly outside the hair salon, because the first time she saw them, in the park, they were wearing glasses. She agreed that her identification of the Respondents was based primarily on the second encounter which took place months after July 21, 2008. The photos that were shown by the CCRB investigator to Delorbe on February 2, 2009, were admitted into evidence [Court Exhibit (CX) 1]. She could not recall stating soon after this incident that

"the tall guy searched my friend " She was only certain that Respondent Torres had searched Flores "because he was the one that found the key" to Flores' car

Luis Flores

Flores testified³ that he resides in the Bronx and is employed by Restaurant Depot. He was previously employed as a taxi driver, he has never been arrested and he has never filed a civil lawsuit against the Police Department.

At about 12 30 p m on July 21, 2008, he was in St. Mary's Park talking with his friend Delorbe, [REDACTED] while the kids were playing in the playground in front of them. Three people, two men and a woman, came up to them from behind them. Flores realized that they were police officers because he could see that they were wearing bulletproof protective vests underneath their T-shirts. One of the male police officers, "the shorter one" who later said that he was "Officer Mercado," told Flores to put his hands up and then he searched through Flores' front and back pockets. Flores had driven to the park that day in his [REDACTED]. The male police officer found the remote for his [REDACTED] in his pocket. The male police officer asked him, "What is this? Where did you find this?" Flores told the male police officer that it was the remote for his car. The male police officer told him, "I have a remote similar to that. Is that a [REDACTED] [REDACTED]?" Flores pointed to where he had parked his [REDACTED] [REDACTED]. The male police officer took Flores' ID and Delorbe's ID and walked away. He came back in two minutes. Delorbe asked the male officer, "Why did you do that?" The male officer got upset. He asked her, "What did you say?" He then told her that he did not want to see her again in the park again and that if he saw her in the park

³ With the assistance of Spanish to English translator Sergeant Rosa Ryan.

again he would give her a summons Flores pointed to and identified Respondent Torres as this male officer Flores did not make an in-court identification of Respondent Valerio

On cross-examination, Flores testified that Respondent Torres' T-shirt was tight and that on all three officers Flores could see a bulge indicating that they were wearing protective vests He recalled that Respondent Torres was shorter than the other male officer and that he had a small mustache but he could not recall if he was wearing glasses He recalled that he told CCRB that Respondent Torres was Latin and shorter and smaller than himself

The Respondents' Case

The Respondents testified in their own behalf

Respondent Torres

Respondent Torres confirmed that on July 21, 2008, he was assigned to PSA 7 and he performed a tour of duty which started at 0930 hours and ended at 1900 hours, assigned to anti-crime duties in a number of housing developments located within the 40 and 42 Precincts He was the anti-crime team's driver Respondent Valerio was the anti-crime team's supervisor and Officer Duluc was the other member of the team They were all dressed in plainclothes He testified that since it was summertime, he would have been wearing shorts, sneakers and a baggy T-shirt to hide the fact that he was wearing a vest He asserted that he never entered St Mary's Park on July 21, 2008, and that he had no interaction at all with Delorbe or Flores that day He testified that St Mary's Park is

not located within a housing development and PSA 7 has no enforcement duties regarding St Mary's Park

He recalled having an encounter with Delorbe months later on 149 Street. She approached him and Respondent Valerio while they were waiting for a red light to turn to green. She called him using another name and he told her that was not his name. He never reveals personal information to civilians, such as what type of vehicle he owns.

On cross-examination, he recalled that when Delorbe approached the vehicle that he and Respondent Valerio were sitting inside on 149 Street, she had approached the passenger side and he was in the driver's seat. Their conversation with Delorbe was brief, a matter of seconds "more or less." Respondent Torres recalled that Delorbe had asked him, "Are you officer so and so?" and that she had referred to him by a different name than Torres. He agreed that on July 21, 2008, he owned a [REDACTED]

Respondent Valerio

Respondent Valerio confirmed that on July 21, 2008, he was assigned to PSA 7 and he performed a tour of duty which started at 0930 hours and ended at 1900 hours, assigned to anti-crime duties in a number of housing developments located within the 40 and 42 Precincts. He was the anti-crime team's supervisor and Respondent Torres was his driver. Officer Duluc was the other member of the team and all three of them were dressed in plainclothes. He testified that he always wears clothes that hide the fact that he was wearing a vest. He asserted that his team never entered St Mary's Park on July 21, 2008, and that they had no interaction at all with Delorbe or Flores that day. He

testified that St Mary's Park is not located within a housing development and PSA 7 had no enforcement duties regarding St Mary's Park

He recalled having an encounter with Delorbe months later when he and Respondent Torres were stopped at a traffic light on 149 Street approaching St Ann's Avenue She asked them, with a smile on her face, "You don't remember me?" They responded, "No " She had a conversation with Respondent Torres but she addressed him by a different name

On cross-examination, Respondent Valerio was questioned about his activity log entries for July 21, 2008 (DX 3) Respondent Valerio agreed that his entries show that at 11 40 a m the team was patrolling the St Mary's Park Houses, that at 12 25 p m he and his team were leaving the vicinity of this development, and that at 12 55 p m he and his team were patrolling the Patterson Houses, which are several blocks west of St Mary's Park Respondent Valerio recalled that when Delorbe approached their car on 149 Street and St Ann's, while they were at a red light waiting for it to turn to green, she had referred to a previous encounter with them and told them, "I have been looking for you guys " She accused them of having stopped her and, as she made this accusation, she pointed eastbound from St Ann's in the direction of St Mary's Park

FINDINGS & ANALYSIS

It is charged that on July 21, 2008, inside St Mary's Park in the Bronx, Respondent Valerio engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that he abused his authority by supervising stops and searches of Delorbe and Flores without sufficient legal authority, and that Respondent

Torres engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that he abused his authority by threatening to issue summonses to Delorbe and Flores without sufficient legal authority, and by failing to provide his name or shield number to them upon request. Each Respondent is also charged with having failed to make notations about the encounter with Delorbe and Flores in his activity log and with having failed to prepare a UF-250 Stop and Frisk Report, and Respondent Valerio is also charged with having failed to ensure that Respondent Torres made entries in his activity log and prepared a UF-250 Stop and Frisk Report.

The Respondents both asserted that they and Officer Duluc never entered St Mary's Park on July 21, 2008, and that they had no interaction at all with Delorbe or Flores that day.

I credit the testimony of both Delorbe and Flores that three plainclothes police officers approached them inside St Mary's Park on July 21, 2008 at 12 30 p m , stopped them and searched them for no reason, and that one of the male officers threatened to issue summonses to Delorbe and failed to provide his real name to her after she had asked him to tell her his name. It is not disputed that Delorbe and Flores immediately reported what had happened to them at the 40 Precinct and to CCRB and that they cooperated in CCRB's investigation of their allegations. The record is devoid of any reason or motive, financial or otherwise, that Delorbe or Flores had to invent or to pursue these allegations. On the contrary, neither displayed an anti-police bias, and their respective testimonies had the ring of truth in that neither alleged that any of the officers had cursed at them, threatened to arrest them, or physically abused them.

Respondents' counsel argued that Delorbe's and Flores' testimony about the type of plainclothes the officers were wearing raises an issue to as whether these three persons were actually police officers. Respondents' counsel asserted, without testimonial support from other than the Respondents themselves, that it would be highly unusual for on duty plainclothes anti-crime officers to wear T-shirts that were tight enough that Delorbe and Flores could discern that they were wearing protective vests. However, I find that the manner in which Delorbe and Flores were questioned, the fact that they were asked to produce IDs, their descriptions of how they were frisked, and their testimony that Delorbe was searched only by the female and Flores was searched only by a male, in accordance with normal Department search procedures, establishes that these three persons were police officers.

As to the question of whether the Respondents are the two male police officers who accosted Delorbe and Flores inside St. Mary's Park on July 21, 2008, the Respondents contend that this is a case involving mistaken identification.

Delorbe and Flores both made in-court, corporeal identifications of Respondent Torres at this trial, and Delorbe made an in-court identification of Respondent Valerio, although Flores did not. However, my finding that the Department sufficiently proved that the Respondents were the male officers who stopped Delorbe and Flores inside St. Mary's Park on July 21, 2008, does not rest solely on these in-court identifications because Delorbe credibly testified that she saw the Respondents again a few months later and they admitted to her that they were the officers who had stopped her; and because

the record contains substantial circumstantial evidence which serves to support the accuracy of the in-court identifications. This circumstantial evidence consists of the following

- The three plainclothes officers described by Delorbe and Flores match the gender, ethnic, and physical characteristics of this three officer anti-crime team

Delorbe and Flores described the three plainclothes officers who accosted them as a short, Hispanic-looking male who spoke both English and Spanish, a taller Hispanic-looking male, and a Caucasian-looking female. Respondent Torres is a fairly short, Hispanic-looking male who is able to speak both English and Spanish, Respondent Valerio is a taller Hispanic-looking male, and Officer Duluc is a Caucasian female.

Also, the record is devoid of any evidence that another team of three plainclothes officers, assigned to any command, consisting of two Hispanic-looking men and a Caucasian female were on duty anywhere in the vicinity of St. Mary's Park at about noon on July 21, 2008.

- Respondent Valerio's activity log entries for July 21, 2008 (DX 3) show that his three officer team was in the immediate vicinity of St. Mary's Park at the time when Delorbe and Flores were approached by three plainclothes officers.

Delorbe and Flores recalled that the three officers approached them at 12:30 p.m. Respondent Valerio's entries show that at 11:40 a.m. the team was patrolling the St.

Mary's Park Houses, that at 12 25 p m he and his team were leaving the vicinity of this development which is only a few blocks from St Mary's Park, and that at 12 55 p m he and his team were patrolling the Patterson Houses, which are just several blocks west of St Mary's Park (DX 1)

- The officer who searched Flores stated that he owned a [REDACTED] which is the car that Respondent Torres owned

Delorbe and Flores specifically recalled that when the male officer who searched Flores person found Flores' car keys to his [REDACTED], the officer stated that he had the same car. Respondent Torres admitted that during July, 2008, he owned a [REDACTED]. Respondent Torres' counsel argued that the [REDACTED], even when limited to the Hybrid version of this vehicle, was such a popular make and model during 2008 that the fact that Respondent Torres owned such a vehicle was mere coincidence and has little or no probative value. However, I find that when this fact is viewed in conjunction with the other circumstantial evidence cited above, the fact that Respondent Torres owned the specific vehicle that the officer who searched Flores stated that he owned, this fact constitutes circumstantial evidence which supports the accuracy of the Delorbe's and Flores' in-court identifications of Respondent Torres as the officer who searched Flores.

Adding to this substantial circumstantial evidence are the admissions the Respondents made to Delorbe during a subsequent encounter that the Respondents both recalled. I will discuss these admissions next.

- Delorbe credibly testified that when she saw the Respondents again only a few months after July, 2008, they admitted that they were the officers who had stopped her in St Mary's Park.

The Respondents argued that Delorbe's and Flores' in-court corporeal identifications of the Respondents at this trial are unreliable because of the amount of time that has passed since the incident in St Mary's Park, and because neither Delorbe nor Flores picked out the Respondents' photographs from the photos of male police officers that were displayed to them at the photo showing that was conducted at CCRB on February 2, 2009 (CX 1)

The mere fact that Delorbe and Flores did not pick out the Respondents' photos during the photo showing at CCRB does not negate the reliability of their corporeal identifications in the Trial Room because the photos of the Respondents are not mirror images of how their faces looked in July, 2008, and because the record establishes that Delorbe had ample opportunity to view both Respondents' faces and Flores had ample opportunity to view Respondent Torres' face when he was searched by him in St Mary's Park ⁴

In particular, the photo of the face of Respondent Torres shows him to have an unblemished and smooth-skinned face whereas Delorbe was adamant in her testimony

⁴ See People v Chamberlain, 96 A D 2d 959, 466 N Y S 2d 860, 1983 N Y App Div LEXIS 19589 (3rd Dept. 1983), where a corporeal identification of the defendant was found to be reliable, even though the identifying witness had previously been unable to identify the defendant's photo from a photo array, because the court found that the record established that the witness had ample opportunity to view the defendant during the commission of the crime

that the distinguishing characteristic she memorized about Respondent Torres' face on July 21, 2008, was that he had marks or "dots" as she called them, on his face

Also, although Flores' in-court identification of Respondent Torres was made over two years after the encounter in St Mary's Park, Delorbe's in-court identifications of both Respondents can be said to have an independent basis as the result of an intervening event. That intervening event, Delorbe testified, occurred a few months later when she saw the Respondents inside a Chevrolet Impala on 149 Street and St Ann's. Delorbe testified that after she told them, "I am the girl from the park. Remember that day?" the Respondents laughed and asked her, "Are you still mad at us? You know we were kidding." These statements by the Respondents constituted admissions that they were the officers who had stopped Delorbe and Flores in the park.

The Respondents corroborated much of Delorbe's testimony about this post-encounter. They acknowledged that Delorbe had approached their car on 149 Street and St Ann's and that she had referred to a previous encounter with them. Respondent Valerio specifically recalled that Delorbe told them, "I have been looking for you guys," that she accused them of having stopped her, and that she pointed eastbound from St Ann's in the direction of St Mary's Park. Respondent Torres specifically recalled that Delorbe approached the passenger side of their car and that she asked him, "Are you officer so and so?" referring to him by a different last name. This testimony is consistent with Delorbe's claim that on July 21, 2008, in St. Mary's Park, Respondent Torres told her that he was "Officer Mercado."

The Respondents asserted that this very minor encounter, which took place while they were waiting for a red light to turn to green, was the first and only time that they had

ever met Delorbe. Yet the Respondents remembered the encounter in some detail even though it was extremely brief and uneventful and, thus, unmemorable. The Respondents' fairly detailed memories of this non-event support Delorbe's contention that this was not their first and only encounter. Based on the above, I credit Delorbe's testimony that the Respondents asked her, "Are you still mad at us?" and then told her, "You know, we were kidding."

I do not find that Delorbe's testimony was impeached by the fact that there are some apparent inconsistencies between her trial testimony and statements she made to CCRB. Her statement to CCRB that, "I take my kids to the park all the time. This day, I wasn't with them. I was with my friend," does not clearly impeach her trial testimony that she was watching her kids playing in the playground from some distance away while she was sitting on a rock next to Flores.

Also, although it appears that Delorbe has made inconsistent statements about whether Respondent Torres was wearing a hat, this detail does not require that the rest of her testimony be disregarded. A close reading of her statement at CCRB on February 2, 2009, that "he got a hat on" shows that the question posed to Delorbe was "So you are saying the first time you didn't see his hair at all, he had a hat on?" and that Delorbe's answer was "Yeah. I mean, I couldn't tell how short it [Respondent Torres' hair] was. He got a hat on, but this time he didn't have no glasses this time, so I could tell, you know, his face." Although the CCRB interviewer's question appears to be referencing July 21, 2008, I find it significant that Delorbe included in her answer that "this time" he was not wearing glasses. When she was asked to explain this alleged discrepancy, Delorbe explained "that the second time that I saw him it was more clear because the first

time he got glasses and the second time he didn't have no glasses " Thus, her statement at CCRB that "this time he didn't have no glasses this time" clearly indicates that she was referring to her fall, 2008, encounter with the Respondent

Finally, I would note that the Respondents had a motive to deny that they were in St Mary's Park while on duty on July 21, 2008, because their presence in the park while on duty constituted being off post The Respondents confirmed that since they were assigned to PSA 7, their anti-crime duties were limited to patrolling within housing development grounds Since, as the Respondents acknowledged, St Mary's Park is not located within any housing development (DX 1), the Respondents had no enforcement duties within St Mary's Park Thus, when they got out of their unmarked vehicle and entered St Mary's Park, the Respondents knew that they were off of their post without having received permission to be off post

In conclusion, the Department presented credible evidence which sufficiently proves these charges by a preponderance of the credible evidence

I find the Respondents Guilty as charged

PENALTY

In order to determine appropriate penalties, the Respondents' service records were examined See *Matter of Pell v Board of Education*, 34 N Y 2d 222 (1974)

Respondent Valerio was appointed to this Department on April 30, 1995, after having served with the Housing Authority Police Department Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum

Respondent Torres was appointed to the Department on July 7, 1999. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent Valerio has been found Guilty of having engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that he abused his authority by supervising stops and searches of Delorbe and Flores without sufficient legal authority.

He has also been found Guilty of having failed to make notations about the encounter with Delorbe and Flores in his activity log, having failed to prepare a UF-250 Stop and Frisk Report, and having failed to ensure that Respondent Torres made entries in his activity log and prepared a UF-250 Stop and Frisk Report.

Respondent Torres has been found Guilty of having engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that he abused his authority by threatening to issue summonses to Delorbe and Flores without sufficient legal authority, and in that he failed to provide his name to Delorbe after she requested that he tell her his name.

He has also been found Guilty of having failed to make notations about the encounter with Delorbe and Flores in his activity log and having failed to prepare a UF-250 Stop and Frisk Report.

The Assistant Department Advocate made no recommendation as to penalty in either his opening statement or his closing statement at this trial.

In Disciplinary Case Nos. 85014/09 & 85653/09 (signed October 21, 2010), a

four-year police officer with no prior disciplinary record pleaded *nolo contendere* and accepted an offer of ten vacation days for making two unjustified stops. During one of the stops, Respondent searched the civilian and made a discourteous remark.

In Disciplinary Case No. 85857/09 (signed October 21, 2010), a 20-year officer with one prior disciplinary adjudication negotiated a penalty of eight vacation days for stopping an individual without having the requisite reasonable suspicion to do so and failing to record the stop in his Activity Log.

In Disciplinary Case No. 84356/08 (signed December 14, 2010), a ten-year detective with no prior disciplinary record forfeited five vacation days for conducting a car stop without sufficient legal basis and for losing his Activity Log.

In Disciplinary Case Nos. 85604/09 & 85651/09 (signed October 13, 2010), an eight-year police officer with no prior disciplinary record forfeited ten vacation days for, during the course of a car stop, searching the interior of the car without sufficient legal authority, failing to provide his Activity Log to the CCRB investigator, and neglecting to make Activity Log entries and prepare a UF-250 regarding the stop.

Finally, with regard to Respondent Torres, in Disciplinary Case No. 83731/08 (signed on April 29, 2009), an eight-year member with no prior disciplinary record forfeited five vacation days for failing to provide his name and shield number upon request during a car stop. In that case, as here, the Respondent made a willful and intentional attempt to conceal his identity to avoid responsibility for his actions.

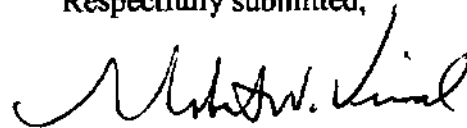
In fashioning a penalty recommendation I have taken into consideration the Respondents' performance records and their lack of previous formal disciplinary adjudications. It is recommended that Respondent Valerio (who, as Respondent Torres'

SERGEANT FERNANDO VALERIO
POLICE OFFICER ALBERT TORRES

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supervisor, was responsible for any police action he took) forfeit 15 vacation days It is recommended that Respondent Torres forfeit ten vacation days

Respectfully submitted,



Robert W Vinal
Assistant Deputy Commissioner - Trials

APPROVED



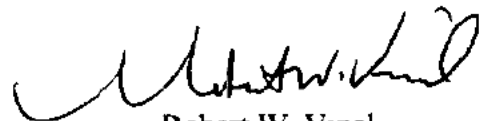
AUG 12 2011
RAYMOND W KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From Assistant Deputy Commissioner - Trials
To Police Commissioner
Subject CONFIDENTIAL MEMORANDUM
SERGEANT FERNANDO VALERIO
TAX REGISTRY NO 914032
DISCIPLINARY CASE NO 86053/10

The Respondent received an overall rating of 4.5 on his 2009 performance evaluation, 4.5 on his 2008 evaluation, and 4.0 on his 2007 evaluation. He has been awarded one Meritorious Police Duty medal and three Excellent Police Duty medals. [REDACTED] He has no prior formal disciplinary record.

For your consideration



Robert W. Vinal
Assistant Deputy Commissioner - Trials

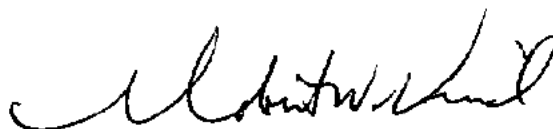
POLICE DEPARTMENT
CITY OF NEW YORK

From Assistant Deputy Commissioner - Trials
To Police Commissioner
Subject CONFIDENTIAL MEMORANDUM
POLICE OFFICER ALBERT TORRES
TAX REGISTRY NO 924562
DISCIPLINARY CASE NO 86054/10

The Respondent received an overall rating of 4.5 on his 2009 performance evaluation, 4.5 on his 2008 evaluation, and 4.0 on his 2007 evaluation. He has been awarded two Meritorious Police Duty medals and four Excellent Police Duty medals. [REDACTED]

[REDACTED] He has no prior formal disciplinary record.

For your consideration



Robert W. Vinal
Assistant Deputy Commissioner - Trials